In the Supreme Court
OF THE
United States

Office - Supreme Court
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OCTOBER TERM, 1940

No. 145

NICK BALABANOFF,
Petitioner,

vs.

R. H. KELLOGG, C. P. MORGAN, PEARL E. KELLOGG, JOSEPHINE L. KELLOGG, LAURENCE SOWLES and MARTHA ALDRICH, doing business under the firm name and title of Cache Creek Mining Company,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a decision of the United States Circuit Court

of Appeals for the Ninth Circuit, which decision was entered in the above-entitled matter after rehearing on January 15, 1941, affirming a decree rendered by the District Court of the Territory of Alaska, Third Division, one of the judges dissenting.

OPINION OF CIRCUIT COURT OF APPEALS.

The opinion of the Court below filed December 10, 1940, with the dissenting opinion and its opinion on rehearing filed January 15, 1941, are reported in 118 Federal Reporter (2d) p. 597.

OPINION OF TRIAL COURT.

The opinion of the trial Court appears at page 103 of the Transcript of Record.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Sections 138, 135 and 347 (2) of the Judicial Code (28 U. S. C. A. 225 and 235) and under the rules of the Supreme Court numbers 38, 39, 41, 42 and 43, as the same appear in 306 United States Reports.

This decision is at variance with fundamental pronouncements laid down in decisions of other Federal

Courts and of this Court upon the use of water in placer mining and as to the appropriation and ownership of the right to its use on the public domain.

The disposition made of this suit by the lower Courts, if allowed to stand, will change all long-used and established systems of pleading and procedure heretofore followed by the Federal and State Courts.

The Courts have in the rendition and affirmance of the decree herein, departed from express statutory provisions and also from the accepted and usual course of judicial proceedings, and we urge that there is here a call for the exercise of supervision of this proceeding by the Supreme Court of the United States.

STATEMENT OF THE CASE.

This is a suit for an injunction inhibiting the defendant from the use of water flowing on defendant's mine in Nuggett Creek, Alaska.

The complaint alleges:

That Nuggett Creek is a natural water course flowing all its length through placer claims, and that the plaintiff is the owner of "Discovery" claim, and all mines below it on that creek.

That the plaintiff is hydraulic mining by means of water conveyed through a ditch that has its intake far upstream and which ditch extends therefrom along the right bank of Nuggett Creek until opposite "Discovery" claim. (Tr. pp. 3, 4.)

That plaintiff was using the ditch to divert this creek water around and away from down-stream claims for plaintiff's use on "Discovery" claim.

That the defendant owns three placer mines: "One Above", "Two Above", and "Three Above", all up-stream from plaintiff's locations, and uses Nuggett Creek water thereon in mining.

This case was tried upon a complaint which admittedly, as declared by the trial and Court of Appeals, did not state facts to constitute a cause of action, and which the record shows was never amended.

At the conclusion of the hearings the trial Court said:

"The Court is not going to hold the parties to the pleadings in this case. The Court is doubtful if the complaint states a cause of action.

"The Court is going to supplement the pleadings by the evidence and decide the case under the evidence adduced rather than on the formal pleadings made by the parties." (Tr. p. 105.)

This, we urge, was in excess of the power or jurisdiction of the trial Court.

The method of pleading and the pleadings for and in the Territorial Courts of Alaska are prescribed by Act of Congress.

The Circuit Court of Appeals in its majority opinion said:

"We here treat the complaint as amended."

This, we submit, was beyond its power and authority.

One of the Judges of the Court of Appeals dissented from the decision in this case, and wrote in his opinion that the decree was based on a finding "that appellees and their predecessors in interest made an appropriation of the waters of Nuggett Creek prior to the year 1917". *"This finding was based on nothing at all.* Appellees did not allege, prove or attempt to prove that they or their predecessors in interest ever made an appropriation of the waters of Nuggett Creek." "The decree should be reversed." (Italics ours.)

The prevailing opinion states: "The testimony *tends to show* that the Old Company Ditch was the earliest on the stream." (Italics ours.)

What does "tend to show" mean? Certainly not that the *fact* exists. It is required that the fact be fully proven.

The complaint did not allege and the testimony did not show an appropriation or an adverse continuous use for the Alaska statutory seven years or for any period of time. The prevailing opinion states that "Appellant's claims are riparian." They are, because Nuggett Creek flows through them, but appellant's rights to use water were not asserted or claimed in that kind of a title but because of actual use in placer mining. The mines had been located in 1906. (Tr. pp. 81, 54, 81.) Appellant claimed the right to use the creek water running through his claims in the sluice boxes into which he shoveled the gravel.

> "Placer claims cannot be worked without water."
>
> *Snyder v. Colorado Co.,* 181 Fed. 67.

The mines were there before any ditch. Otherwise there was no need of ditches.

There is an absence of proof of an appropriation of the water and also of an adverse continuous use for seven years. Neither was pleaded or proven.

QUESTIONS PRESENTED.

FIRST. Congress prescribed for the Territorial Courts of Alaska, the forms of pleadings, methods of trial and judgments.

The Court of Appeals herein repeals these Acts of Congress.

Its decision is in direct conflict with those of all other Federal Courts.

SECOND. It violates fundamental principles of pleading, practice and decision heretofore followed.

THIRD. The complaint pleaded no facts constituting a cause of action. It was never amended. The Court had no power to assume that it had been amended. Further, the evidence adduced at the trial did not elicit facts sufficient to state a cause of action.

FOURTH. The decree gave plaintiff 360 inches of water when there is no allegation in the complaint and no evidence that plaintiff had made an appropriation of water.

The ownership of water is dependent upon appropriation and its use.

FIFTH. It is necessary to set forth and prove the facts showing an appropriation or an adverse con-

tinuous user for seven years. It must be proven when the water was to be or was actually diverted and continuously used, the means thereof, and the volume of water actually in use.

CONCLUSION.

For the reasons heretofore set forth, the petitioner respectfully prays that this Court grant its petition for certiorari.

Dated, San Francisco, California,
June 4, 1941.

W. H. METSON,
Attorney for Petitioner.

P. H. MCCARTHY, JR.,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit and the dissenting opinion of Circuit Judge Mathews is reported in 118 Fed. (2d) at p. 597, and are also attached to the certified copy of the transcript as an appendix.

ARGUMENT.

This is a suit in which an injunction was granted enjoining defendant from use of waters on Nuggett Creek, Alaska, where the placer mines of both litigants are situate.

The Courts, both trial and appellate, agree that the complaint did not state a cause of action.

The Circuit Court of Appeals, however, in the prevailing opinion expounds new doctrines, (a) that because some testimony was taken at the trial *"which tends to show* that the Old Company Ditch was the earliest on the stream" and therefore (b) "We here treat the complaint as amended to *conform* to the proof." (Italics ours.) We respectfully urge that something *which tends to show* is not proof of a fact and further that the Court had no jurisdiction to treat the complaint as amended to conform to the proof, even if there had been full "proof" of the fact instead of "tend to prove" introduced at the trial.

Congress has provided for Alaska:

> "That * * * the forms of pleading * * * and the rules by which the sufficiency of such pleadings is to be determined shall be those prescribed by this Code."
>
> Sec. 886 C. Laws (1913) and

Also for a complaint.

> Sec. 874 C. Laws.
>
> "* * * it shall contain a plain and concise statement of facts constituting the cause of action * * *"
>
> Sec. 889 Id.

> "If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, *excepting* only * * * the objection that the complaint does not state facts sufficient to constitute a cause of action." (Italics added.)
>
> Sec. 864 C. Laws 1913.

Therefore that objection is under the law always present.

The Court *may allow* amendments to pleadings (Sec. 974 C. L.) but here there was no request nor order for an amendment and none was made.

We contend that a person who has a cause of action may, if he so desires, proceed by filing a complaint to invoke the power of the Court, but such party is not *obliged* to file a complaint nor amend his complaint if he files one. That is the party's privilege and his alone and he may waive it although such waiver may be against his interests.

It is not a Court's privilege to act for a litigant and especially as to an objection where the statute says specifically it shall not be waived.

It is the duty of the Court to look at the pleadings.

United Shoe v. U. S., 258 U. S. 451.

Nor can the Court aid the allegations of the bill by construction. The bill must be determined as to its equity, "upon the averments contained in it, unaided by construction and unamplified by assumed amendment." The complainant is the actor, and he must present a case entitling him to injunctive relief, or it will be denied. He can be aided by "no rule of

favor, like that of assumed amendment to his initial pleading."

Dean v. Goose Co. Lumber Co., 167 So. p. 570.

"* * * 'But such a decree, if the complainant were entitled to it under the proofs, would be entirely outside of the pleadings on a case not made or contemplated by the bill, and to which the defendant has not been called upon to answer, and, in fact, has not answered. The recovery must be had upon the case made by the pleadings or not at all.' Grosholz v. Newman, 21 Wall. 481, 488. No relief can be granted for matters not charged in the bill, and a party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. Beach Modern Eq. Prac. Secs. 99, 100, 790, and the text-books and numerous authorities cited in the notes."

Baldwin v. Liverpool & L. & G. Ins. Co., 124 Fed. 206, 208, at page 208.

"Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. Bank of U. S. v. Smith, 11 Wheat. 171, 174; Minor v. Mechanic's Bank, 1 Pet. 46, 67; DeLuca v. Hughes, 96 Fed. 923."

Garrett v. Louisville & N. R. Co., 235 U. S. 242, at pp. 244, 245.

"Pleadings are the allegations made by the parties for the purpose of definitely presenting the issues to be tried, and to determine between them."

Tucker v. U. S., 151 U. S. 164.

"A decree granting relief must be based either on the bill and the admissions of the answer, or on the bill and the proof sustaining the cause made in the bill.

A decree cannot be based on allegations without pertinent proof nor on proof without corresponding allegations."

Street, Federal Eq. Pr. (Vol. 2), Sec. 1939, p. 1162.

"Every bill must contain in itself sufficient matter of fact to maintain plaintiff's case."

Harrison v. Mixon, 9 Pet. 493, at p. 503.

"Probata which do not conform to allegata cannot be the ground for decision."

Id. p. 503.

"It is the general rule that the question whether the complaint states facts sufficient to constitute a cause of action is never waived, and may be taken advantage of for the first time in the appellate court and the judgment reversed."

21 *R. C. L.* Sec. 161, p. 624, citing

Slocum v. Pomeroy, 6 Cranch 221;

McAllister v. Kuhn, 96 U. S. 87;

Teal v. Walker, 111 U. S. 242;

Cragen v. Lovell, 109 U. S. 194.

Courts cannot supply omissions in legislation, nor afford relief, because they are supposed to exist.

To adopt the language of Mr. Justice Woods in *Hobbs v. McLean,* 117 U. S. 579:

> "When a provision is left out of a statute either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate, and not to construe."
>
> "* * * It is our duty to interpret, not to make, the law. Words should not be interpreted into a statute, in order that it may include a case which has been omitted merely because there seems to be no good reason why it should have been omitted."
>
> *Grace v. Collector of Customs,* 79 Fed. 315 at p. 318.

> "No mere omission or failure to provide for contingencies will justify judicial addition to statute."
>
> *McRee v. U. S.,* 164 U. S. 287, p. 293;
> *U. S. v. Goldenberg,* 168 U. S. 95, p. 103.

> "If Legislatures proceed on a mistake it is dangerous to declare that a court of law is bound to enlarge the natural import of the words in order to supply deficiencies occasioned by that mistake."
>
> *Barnitz v. Casey,* 7 Cr. 456 (U. S.) p. 468.

> "Since the power to make, alter or repeal laws is legislative, the courts will not encroach upon the domain of a co-ordinate department of the government by judicial enlargement, abridgement, alteration, or repeal of legislative enactment."
>
> 11 *Am. Jur.* 197, citing
> *Ebert v. Poston,* 266 U. S. 548.

"Legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

11 *Am. Jur.* Sec. 204, p. 907;

Ross v. Oregon, 227 U. S. 150;

Prentiss v. Atlantic Coast Line, 211 U. S. 216;

Sinking Fund, 99 U. S. 700.

"The judicial power is exercised in the decision of cases; the legislative in making laws."

Penn v. Wheeling, 18 How. U. S. 421.

"If the law-making power says that a matter within its competence shall be so, so it will be, so far as legal theory is concerned, without regard to the *elegantia juris,* or whether it fits that theory or not."

Wedding v. Meyler, 192 U. S. 573 (Mr. Justice Holmes).

" . . . It is fundamental that a judgement cannot stand unless the facts of record,—apart from any showing by bill of exceptions—aided as far as may be by the verdict, will support it."

Slocum v. Pomeroy, 6 Cranch 224;

United States Bank v. Smith, 11 Wheat. 172;

World's Col. Expos. Co. v. Republic of France, 91 Fed. Rep. 64, at page 69.

"In equity the proof must conform to the allegations, and the examination of the court is confined to the issues made by the pleadings. (Providence Rubber Company v. Goodyear, 9 Wall. 788, 799, 804; Agawam Woolen Co. v. Jor-

dan. 7 Wall. 583, 610; Andrews v. Drake, 83 Fed. (2d) 767; Lewis Teese et al. v. Huntington, 23 How. 2, 14; Ferguson Cont. Co. v. Manhattan Trust Co. 118 Fed. 791; Hitchcock v. American Gas Co., 259 F. 948; General Elec. Co. v. Continental Lamp Works, 280 Fed. 846)."

Reynolds Spring Co. v. Young, 101 Fed. Rep. (2d) 257, at p. 259.

"It has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. . . . The right of the first appropriator, exercised within reasonable limits, is respected and enforced. . . . The Act of Congress of 1866 recognized the right to water by prior appropriation."

Basey v. Gallagher, 20 Wall. 676 (Field J.).

See also,

Atchison v. Peterson, 20 Wall. 507.

Followed in

Hornbuckle v. Stafford, 111 U. S. 392;

Krall v. U. S., 79 Fed. 243, 174 U. S. 338.

"Water appropriated for use on claim in gulch must, after use, be discharged therefrom for use of claims below."

Alder Gulch Mg. Co. v. Hayes, 6 Mont. 38, 9 Pac. 585.

"Appropriation does not confer such an absolute right to the body of water diverted that owner can allow it to run to waste and prevent others from using it."

Atchison v. Peterson, 20 Wall. 507.

The evidence adduced at the trial did not show an appropriation of water by complainant. Simply that at times it diverted water through a ditch to use hydraulically.

An appropriation can only be made of water that is *then* unappropriated.

If water is being used for a beneficial purpose it cannot be taken away from the first user except upon the allegation and proof of seven years continuous adverse use by the second user.

It was alleged in plaintiff's complaint that *both* the plaintiff and defendant were using the water of Nuggett Creek and that the Creek was located from source to mouth as placer mines. That does not allege an adverse user. It was in evidence that mining commenced on Nuggett Creek in 1906 and no contradiction. That all parties were mining more or less on the creek and that three mine operators at least excavated and used ditches and that plaintiff also used water through ditches but how much and over what periods was not shown. Such evidence does now show continuous nor adverse user.

There was no measurement of the water made, yet the trial court awarded an exact measurement of 360 inches of water.

The mines naturally were there before ditches—ditches are not necessary to placer mining, but water is, and was when the placer mines were located. Did the ditch builder take away the miner's sluice box water? There is no evidence of when, if he did. There

is no evidence of inception of title or when or how initiated.

> "An adverse use of water for the statutory period must be open, notorious, peaceable, continuous and under claim of right."
>
> *Mining Co. v. Dangberg,* 81 Fed. 115;
>
> *Mining Debris Cases,* 18 Fed. 753;
>
> *Winter v. Winter,* 8 Nev. 192.

> "Evidence of a prescriptive right must be clear and conclusive."
>
> *Morris v. Bear,* 140 Fed. 433.

> "The right acquired by prescription is only commensurate with the right enjoyed. A mere scrambling possession of the water gives no prescriptive right, nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream for all other claimants."
>
> *Union Co. v. Dangberg,* 81 Fed. 115.

> "Where adverse possession is relied upon to give title, possession for full period required by statute must be definitely shown."
>
> *Grosholz v. Newman,* 21 Wall. 481 (at p. 487).

The right of the first appropriator is fixed by his appropriation and when others locate upon the stream, or appropriate the water, he cannot change his original appropriation, or make any change in the channel to their injury.

All that is alleged in the complaint in that regard is as to a proposed diversion *above* the intake of the Old Company ditch. (Par. V, Par. VIII Complaint.)

It is not alleged nor was it shown by evidence as to when *low water* season begins or when it ends, or when was the normal flow, (Par. VIII Tr. p. 5) or when the ditch owners used most or the miners used it. Because if the miners were not using the water all the time the ditch owners could for that period when not in use, take all the water for the time being.

The opinion says:

> "Exact measurements were not taken either of the volume of water in the creek or of the quantity used in the Company's hydraulic operations. But scientific accuracy is too much to expect in cases of this character arising in that primitive country."

But the decree is exact. It gives the appellee exactly 360 miner's inches of water and this, although as stated in the opinion, there was no evidence of measurement except that water that flowed through nozzles.

About the only testimony on measurement was that of Harper, who said "I was using two three inch nozzles under, I *think,* a 325 foot head". (Tr. p. 71.) (Italics ours.)

From these facts it is impossible to compute the volume of water since the size of, and the head at, the intake, the size of the pipe, the length of the pipe, the condition of the pipe as well as the number of bends and angles must be known before the volume of water discharged through the nozzles can be computed.

The *Van Dyke v. Midnight Sun* case, 177 Fed. 85, cited as authority in the prevailing opinion in this

case, is, we think, directly contrary to the conclusion applied thereto in this case by it.

In the *Midnight Sun* case it is written:

> "There is nothing, however, *in the evidence,* nor, indeed *in the pleading* of the plaintiffs in error, tending to show the amount of the water in the creek they had diverted for beneficial purposes prior to the appropriation under which the defendant in error claims. Inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of waters upon the public land, we think no such notice essential to the validity of a bona fide diversion of such waters for a beneficial use in Alaska, and therefore, in the final judgment to be entered in this cause, *care should be taken to provide that it be without prejudice to any rights the plaintiffs in error may be able to establish to any of the waters of Hurrah Creek by virtue of any appropriation made by them,* or those under whom they claim, for beneficial uses, prior to the appropriation under which the defendant in error holds." (Italics added.)

So, we urge that an inception of the use of water not *theretofore appropriated* should be alleged and must be shown and *neither* was proven in the instant case.

That at different or the same times, as was shown by the evidence, some water was used on other mines on the creek, does not even tend to show that water had not theretofore been appropriated by some then user thereof.

As between two appropriators of same water flowing over the public lands in Alaska, priority of time gives priority of right.

Miocene Co. v. Campion, 3 Alaska 572;
Egler v. Baker, 4 Alaska 142.

In *Broder v. Water Company,* 101 U. S. 276, 25 L. Ed. 760, the Court said:

> "It is the established doctrine of this Court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had by its conduct recognized and encouraged, and was bound to protect, before the act of 1866."

We therefore most respectfully submit that the United States Circuit Court of Appeals for the Ninth Circuit has gone far afield from the usual course of judicial proceedings and that this decision is in direct conflict with all other decisions of our Federal Courts on the doctrine of appropriation and the right to use water on the public domain.

Dated, San Francisco, California,
June 4, 1941.

W. H. METSON,
Attorney for Petitioner.

P. H. MCCARTHY, JR.,
Of Counsel.

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Respondents.

Brief Opposing Petition for Certiorari to the Circuit Court of Appeals for the Ninth Circuit

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Petitioner,

vs.

R. H. KELLOGG, C. P. MORGAN, PEARL E. KELLOGG, JOSEPHINE L. KELLOGG, LAURENCE SOWLES and MARTHA ALDRICH, doing business under the firm name and title of CACHE CREEK MINING COMPANY,

Respondents.

Brief Opposing Petition for Certiorari to the Circuit Court of Appeals for the Ninth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent respectfully urges that the petition for writ of certiorari herein should be denied for the following reasons:

That none of the reasons for granting certiorari set forth in paragraph 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States exists in this cause and the reasons set forth by petitioner are not supported by the record.

ARGUMENT.

Petitioner bases his petition upon a statement of the case that is misleading, incorrect, incomplete and argumentative. His most important misstatement is "This case was tried upon a complaint which admittedly, as declared by the trial and Court of Appeals, did not state facts to constitute a cause of action, * * *" (Pet. p. 4).

The fact is that no such admission was made, and that the complaint did state a cause of action.

The importance of the alleged admissions lies in the petitioner's assumption that both trial and Circuit Court of Appeals, having decided that the complaint did not state a cause of action, disregarded the condition of the pleadings and rendered judgment thereon.

At the close of the trial, no objection to the complaint having been interposed by demurrer, by motion to make definite and certain, by objection to testimony because not based upon allegations, by demurrer to the evidence or by motion to dismiss the trial judge delivered an oral opinion (Tr. p. 103) in which he used the following language:

> "The court is not going to hold the parties to the pleadings in this case. The court is doubtful if the complaint states a cause of action * * *.
>
> The court is going to supplement the pleadings by the evidence and decide this case under the evidence adduced rather than on the formal pleadings made by the parties."

Petitioner obviously ignores the word "doubtful" and the word "formal" in the trial court's remarks.

OPINION OF TRIAL COURT NOT PART OF RECORD.

About four months after that oral opinion the trial court made findings of fact, conclusions of law, filed them and rendered judgment based upon them. The findings and conclusions constitute the decision of the court. *Compiled Laws of Alaska* (hereinafter cited as *C. L. A.*) 1933, Secs. 3619 and 3870. Pertinent parts of Sec. 3870 are as follows:

> * * * "In all such actions (actions of an equitable nature) the court in rendering its decisions therein shall set out in writing its findings of fact upon all material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk, and shall be incorporated in, and constitute a part of the judgment roll of the case; and such findings of fact shall be subject to review by the appellate tribunal, and may be amended to conform to the evidence." * * *

In *Juneau Water Co. v. Jualpa Co.,* 3 Alaska 382, 387, it was held that an opinion filed by the judge "is merely a written argument or reason given by the court, to which reference is made in the last part of Section 209 (now 3619 *C. L. A.* '33) of the Code."

In *England v. Gebhardt,* 112 U. S. 502, 28 L. ed. 811, 5 S. Ct. 287, which was a writ of error to reverse an order of the Circuit Court remanding a suit at law to the state court from which it had been removed, there were in the transcript certain affidavits, and what "purported to be the opinion of the judge denying the motion, from which it appeared that 'the motion to remand this cause was founded upon the allegation that both the plaintiff and defendant were citizens of the state of New Jersey when the summons was issued and served and the petition for removal filed' " The plaintiff in error stated the question for review thus, "But what is sought to be reviewed in this case is not an exercise of the discretion of the Circuit Court, but its judgment on the law and the facts out of which the question of jurisdiction arose." This court considering whether the record showed error, said:

> *"Neither is the opinion of the court a part of the record.* Our rule 8, Sec. 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record." (Italics ours.)

The court said in *Mutual Reserve Fund Life Assn. v. Du Bois,* 85 Fed. 586:

> "The insufficiency of the record is still further disclosed in the assignments of error which are directed mainly to the opinion of the court, and cannot be considered since the opinion of the court is no part of the record;" * * *.

In *Stone v. United States,* 164 U. S. 380, 383, 41 L. Ed. 477, 17 S. Ct. 71, counsel for appellant contended that the trial court attempted to create a rule of evidence as to the number of witnesses required in different classes of cases and counsel evidenced this partially by reference to statements contained in the trial court's opinion. This court speaking by Mr. Justice Brewer said

> "We are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings."

We respectfully urge that the argument or reason for his action expressed by the trial judge cannot be made the basis for granting this writ, and, if we are wrong in that position, nevertheless the petitioner may not expand the doubt expressed by the trial court into the admission claimed by petitioner.

THE APPELLATE COURT HELD THE COMPLAINT SUFFICIENT.

In his "Amended Assignment of Errors", paragraphs I, II and III (Tr. p. 126) petitioner for the first time attacked respondent's complaint.

As to that attack the Circuit Court of Appeals said (Tr. p. 143):

> "We turn to the other arguments advanced by appellant. He contends (1) that the complaint fails to state a cause of action," * * *
>
> "In the absence of appropriate attack upon it we think the complaint must be held to state facts sufficient to entitle appellees to some relief." * * *

That is a far cry from the admission set forth by petitioner (Pet. p. 4) as a fact.

CODE AND AUTHORITIES SUSTAIN TREATING COMPLAINT AS AMENDED.

Petitioner says (Pet. p. 4) that the trial and appellate courts each went beyond its authority in treating the complaint as amended. Even assuming that the complaint was defective as to statement of appropriation nevertheless the trial judge had the sanction of the Code and of the established law in treating the complaint as amended under the admitted circumstances.

Section 3461 *C. L. A.* 1933 (Sec. 929 *C. L. A.* 1913) provides:

> "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial right of the adverse party."

This section was applied by the Circuit Court of Appeals for the 9th Circuit in *Shea v. Nilima,* 133

Fed. 209, 66 C. C. A. 263, an equity suit arising in Alaska. The opinion supplements the section with the following:

"2. We are of the opinion that the complaint states facts sufficient to constitute a cause of action in equity; that the objections urged thereto are more to the form than to the substance. Some of the objections made thereto are purely technical; others are based upon the theory that the suit was a mining copartnership pure and simple; and others that the existence of a partnership and date of location of the claim are uncertain. A motion to have made it more certain and definite would doubtless have been allowed.

In Pomeroy's Code Rem. (3d Ed.) §549, the author said:

'The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or *can be inferred by reasonable intendment from the matters which are set forth* although the allegations of these facts are imperfect, incomplete and defective—such insufficiency pertaining, however, to the form rather than to the substance—the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment. * * * If, instead of alleging the issuable facts, the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclu-

> sions of law in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion and not by a demurrer.' " (Italics ours.)

Following petitioner's citation from 21 *R. C. L.* p. 624, Sec. 161, that section continues:

> * * * "Where a complaint is first attacked in the appellate court, on the ground that it does not state facts sufficient to constitute a cause of action, it will, however, be liberally construed in order to uphold the judgment, and, if it contains allegations from which every fact necessary to maintain the action may be inferred, it will be sustained." * * * "It has been held that if a material element omitted from the complaint is brought into the record by the proofs in the case, which are undisputed and the *fact is admitted by the defendant himself,* the judgment will not be reversed on the general ground that it does not state facts sufficient to constitute a cause of action." * * *(Italics ours.)

In this connection we direct attention to the testimony of petitioner and defendant, Balabanoff (Tr. p. 96), "In 1919, when I signed the agreement marked Plaintiff's Exhibit No. 17 (Receipt for Nugget Creek Ditch Water and agreement regarding use of water, Tr. p. 94) I didn't own any ground at all. I first bought this claim in 1932. *I never claimed to own the Old Company Ditch. The Murrays* (plaintiff's predecessors) *just let me use it."* (Italics ours.)

In 1826 in *Harding v. Handy,* 11 Wheat. 103, 121, which was a bill for an accounting of alleged trust property, it being urged before this court that the decree was not supported by the allegations of the bill, Chief Justice Marshall addressing himself to that objection said:

> "Although a more direct and positive allegation that C. W. was incapable of transacting business would have been more satisfactory * * * yet we think the averment of his incompetency is sufficiently explicit to make it a question in the cause. The defendant has met this charge, and we cannot doubt that his answer is sufficiently responsive to the bill to give him all the benefit which the rules of equity allow to an answer in such circumstances."

Thus it appears that in the days of equity rules before the allegedly more liberal system of code pleading was introduced in the United States the true purpose of pleading was clearly recognized, and if the defendant could determine from the complaint or bill what issues were to be met and he met them and was not at a disadvantage in making his proof at the trial then the complaint or bill was sufficient as against an attack first made in the appellate court.

The bill of exceptions (Tr. pp. 24 to 117) shows that at the trial the defendant understood the issues involved and fully presented his evidence to meet them and was at no disadvantage in making his proof.

FURTHER POINTS SUGGESTED BY PETITIONER'S STATEMENT OF FACTS.

Petitioner's comment upon the statement "the testimony tends to show" made by the Circuit Court of Appeals can hardly be twisted into a ground for granting a writ of certiorari. The appellate court made that statement when considering petitioner's contention that the evidence did not support the findings of the trial court. It was not passing on the weight of evidence nor establishing any rule as to the weight of evidence. It was simply indicating that there was evidence to sustain the court's finding.

Petitioner's statement (Pet. p. 5) "the mines had been located in 1906" was evidently intended to indicate that petitioner's Nugget Creek claims were located in 1906. Examination of the pages of the transcript to which petitioner refers (pp. 54 and 81) shows that Charlie Harper (p. 54) testified "I have been engaged in placer mining in the Cache Creek District in the Yentna mining district ever since 1906 except for four years I was out". The connection is that Nugget Creek is one of the creeks in the Cache Creek mining district. The only reference to 1906 on page 81 is in the testimony of Albert Stinson, who says "I first went to Nugget Creek in 1906 and 1909" * * *. There is not a word in the record that shows that any claim on Nugget Creek was located in 1906 nor at any time prior to the commencement of the Old Company Ditch in 1908.

Fred R. Smith, who in 1915 sold petitioner's claims to Stinson (Tr. p. 82) who in turn sold them to peti-

tioner in 1932 (Tr. pp. 91 and 96) was a witness for petitioner at the trial (Tr. p. 80). So also was Stinson (Tr. p. 81). Both were on Nugget Creek when the Old Company Ditch and the Price and Martin Ditch were being constructed and before the water was turned into them. Neither of these witnesses, nor any other witness, was asked or stated when petitioner's claims were *located.*

It is probably true that claims were located along Nugget Creek prior to 1908, otherwise the Old Company Ditch and the Price and Martin Ditch would not have been commenced. *Non constat* but that all the claims, if any, located on Nugget Creek at that time belonged to plaintiff's predecessors. It was not important whether claims had been located. The important question is, was there any proof that the waters of Nugget Creek were appropriated by other than plaintiff's predecessors prior to 1908 when the Old Company Ditch was commenced. As to that there is not a word in the record.

CITATIONS IN PETITIONER'S BRIEF DISTINGUISHED.

In choosing his authorities petitioner has ignored the rule of construction which we quote from the syllabus of *Grant v. Murphy,* 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188.

> "General expressions used in the decision of a particular case are to be taken as pertinent to the facts then before the court and the questions

> therein involved and not as applicable to and determinative of a question not then in contemplation."

Viewed in the light of that rule many of them are inapplicable.

Petitioner's citation (Brief p. 11) from *United Shoe Machinery Corp. v. United States,* 258 U. S. 451, 66 L. Ed. 708, 42 U. S. Ct. 363

> "It is the duty of the court to look at the pleadings"

was not written in contemplation of the court's right to apply the doctrine of intendment.

Judge Day said:

> "In other words, to determine the effect of a former judgment pleaded as an estoppel two questions must be answered. (1) Was the former judgment rendered on the same cause of action. (2) If not, was some matter litigated in the former suit determinative of a matter in controversy in the second suit? To answer these questions we must look to the pleadings making the issues and examine the record to determine the questions essential to the decision of the former controversy." L. Ed. p. 718.

Petitioner's next citation (Brief p. 12) from *Dean v. Coosa County Lumber Co.,* 167 So. p. 570, was written in considering an application for injunction based upon a bill seeking a temporary and permanent injunction and general relief. The application for injunction was based upon the sworn bill as amended. No answer

or demurrer was interposed by defendants and no evidence either by way of affidavit or oral testimony was offered by either party.

Baldwin v. Liverpool & London & Globe Insurance Co., 124 Fed. 206, was instituted by a bill alleging that on a certain date complainant owned the Tug Seagull and as such owner made application to defendant for insurance thereon. That defendant by mistake wrote the policy in the name of James Reid. The prayer was that the policy be corrected and account of loss be taken and judgment rendered therefor. Judge Wanty's opinion reveals that the proofs show that the plaintiff was only mortgagee, that the policy contained a provision that the insurance should be void if the insured's interest was other than represented; that no application for the insurance was made to defendant by plaintiff and that no mistake was made by the defendant. Judge Wanty said:

> "If Reid (the insured named in the policy) were a party to the suit and there were sufficient averments in the bill to sustain a decree under the prayer for general relief * * *".

He continued with the language quoted by petitioner. That language had reference to a suppositious condition and the facts are not comparable to those of the case at bar.

Garrett v. Louisville & N. R. Co., 235 U. S. 308, 59 L. Ed. 242, 35 S. Ct. 32, was an action for damages under the employer's liability act for the death of a brakeman on a freight train moving in interstate com-

merce. Unlike the case at bar the pleading was attacked, in the trial court, on appeal and again in the Supreme Court of the United States, and one of the reasons for affirming the judgment against was his refusal to amend. The action was brought by the administrator of the deceased who alleged in the first two counts that he was suing for the benefit of the parents of the deceased, and in the third count that the deceased left surviving him not only his parents but brothers and sisters, and that "plaintiff, as administrator of the said decedent sues the defendant in the sum of $50,000.00 damages." The trial judge "having definitely offered the plaintiff an opportunity to amend his declaration which was refused" thereupon excluded all evidence as to deceased's pain and suffering, all tending to show pecuniary loss sustained by the parents, and instructed a verdict in favor of the defendant. The Circuit Court of Appeals tendered a further opportunity to amend which was rejected. No allegation having been made that the parents sustained pecuniary loss the United States Supreme Court affirmed the judgment, and in its opinion used the language quoted by petitioner. Not only in petitioner's citation did Mr. Justice McReynolds indicate the reasons underlying the court's ruling but later in the opinion he elaborated as follows:

> "The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity

> that such loss in fact was suffered. Common experience teaches that financial damage to a parent by no means follows as a necessary consequence upon the death of an adult son. The plaintiff expressly declined in both courts below so to amend his declaration as to alleged pecuniary loss to the parents; and judgment properly went against him."

Tucker v. U. S., 151 U. S. 164, was a criminal case and the portion of the opinion quoted by petitioner was used in determining the difference between an affidavit or application by the defendant to have his witnesses summoned at the expense of the United States and the word "pleading" as used in Section 860 of the Revised Statutes.

Plainly the opinion has no controlling application here.

In 1835 Mr. Justice Story wrote the opinion in *Harrison v. Nixon*, 9 Peters, 483, 11 U. S. 442, cited by petitioner (Brief p. 13). At page 444 (star paging 503) Justice Story said:

> "The allegata and the probata must reciprocally meet and conform to each other".

The bill was one to determine heirship and contained no averment of the actual domicile of deceased. There were allegations in the answer of the executor tending to show that the deceased may have been domiciled in England. The testator's will bequeathed certain property to the "heirs at law" of testator. This court held that an allegation and proof of actual domicile was

indispensable since the law of the domicile of the testator governed as to the meaning of "heirs at law". No such allegation having been made the case was remanded "to the Circuit Court for the purpose of having suitable amendments made in this particular."

We think the statements in Judge Story's opinion are not applicable to the case at bar.

ANALYSIS OF COMPLAINT AND PROOF.

The trial court did not indicate the reasons why he "was doubtful if the complaint states a cause of action."

The Circuit Court of Appeals held that the complaint did state a cause of action.

The petition, subdivision fifth, under the heading "Questions Presented", states petitioner's idea of what should be alleged and proved thus (Pet. p. 7)

> "It must be proved *when* the water was to be or was actually diverted and continuously used, the means thereof, and the *volume* of water actually in use." (Italics ours.)

We presume he wished the court to infer respondent failed to state when, how and how much.

We respectfully submit that those are questions which if well taken make the complaint obnoxious to a motion to make more definite and certain and are exactly such defects as may be aided by being proved. See authorities cited above under heading

"Code and Authorities sustain treating complaint as amended."

The means of appropriation by respondent's predecessors, the construction of Old Company Ditch and Price and Martin Ditch, and the use to which water was put are alleged and admitted (Complt. Par. V and VI, Answer Par. V and VI).

The amount of water used is both alleged by fair construction and proved.

The allegation of complaint, (par. V) is

> * * * "Plaintiff is engaged in hydraulic mining * * * using the waters of Nugget Creek,"

and in paragraph VIII

> "That the waters of Nugget during low water season are not sufficient * * *"

and in paragraph IX

> * * * "The rights of the plaintiff to *all* of the waters of Nugget Creek have been established by a court of competent jurisdiction which fact is well known to defendant" * * * (Emphasis ours.)

Petitioner's affirmative answer contains an admission of the prior rights of respondent's predecessors when he alleges abandonment by them in 1927 (Par. VI) and they show (Par. VII) that he fully understood respondent was claiming all the waters of Nugget Creek. That paragraph reads:

> "That plaintiff is now wilfully and wrongfully attempting to appropriate to its own use all of the waters of Nugget Creek and thereby deprive

> this defendant from the use of half of the water to which defendant is justly entitled."

Respondent's reply to petitioner's answer makes their contentions as to amount even clearer.

We respectfully submit that there was no misunderstanding by either party at the trial as to the time of appropriation. The evidence makes it clear that both the petitioner, as defendant, and the respondent, as plaintiff, proceeded upon one of the following theories, First, that respondent's appropriation was prior to that of petitioner but petitioner claimed an abandonment in 1927 of the Price and Martin Ditch and the water it carried. Unless to sustain petitioner's claim in that behalf we so no reason for his citation of the *Adler Gulch* case and *Atchison v. Peterson* (Brief p. 16) and his statement,

> "The right of the first appropriator is fixed by his appropriation and when others locate upon the stream, or appropriate the water he cannot change his original appropriation or make any change in the channel to their injury."

or, second, that prior appropriation by respondent's predecessors was an issue to be met.

Petitioner's own witnesses, Smith and Stinson, who were also his predecessors in interest, were on the stand and fixed approximately the time of the first appropriation of the waters of Nugget Creek through Old Company Ditch and Price and Martin Ditch and neither made any claim that he had any right to the waters carried in either ditch.

Smith testified (Tr. p. 81):

> "In 1912 Hughett and myself dug half a mile of this ditch (Price and Martin) and Carl Martin helped us to dig 1000 feet on the other end and Price and Martin finished the rest. We took water to No. 1 Above Discovery through this ditch. The Old Company Ditch on the right limit was constructed while I was in that country. There was no time that more than 100 miner's inches of water was taken out of Nugget Creek into the Old Company Ditch. I was there from 1910 to the fall of 1915 and during that period of time not more than 100 miner's inches was taken out of Nugget in the Old Company Ditch." (Tr. p. 81)

Albert Stinson, a witness for the defendant, testified as follows:

> "I reside at Talkeetna and am familiar with Nugget and Cache Creeks. I first went to Nugget Creek in 1906 and 1909 and acquired claims Nos. 1, 2 and 3 Above Discovery from Fred R. Smith in 1915. I owned this ground until I sold it to Nick Balabanoff. While I owned the ground I mined it every year and got my water from Nugget Creek mostly. I had a short ditch from No. 4 dug by Smith and used that part of the time. I was there when the Old Company Ditch was constructed and am familiar with it." Tr. p. 82.

Upon cross-examination Stinson testified:

> "The Old Company Ditch was started about 1908 I believe. They dug part of it and the injunction was served and they stopped. Herendon and Jacobson finished it."

Smith testified (Tr. p. 81):

> "I first went to Nugget Creek in the Spring of 1910 and engaged in mining operations on No. 3 Above Discovery which I owned in partnership with Robert Hughett. We took our water from No. 4 Above Discovery and dug a ditch to convey to No. 3".

Charlie Harper testified (Tr. p. 97):

> "In 1916 I worked some on the Iowa Bench. I had it under lease. I mined there in 1916 and 1917 and was using the flow of water in the Old Company Ditch. I would estimate I was using all the normal state of the water of Nugget Creek. I was not in the country when the Price and Martin Ditch was dug. I knew Hugh Price and Carl Martin. In 1917 I had interference with my use of the water through the Old Company Ditch. The intake to the Price Ditch is on 10 Above and to the Old Company Ditch on 9 above. Water was turned into the Price Ditch after it was completed in 1911. I was mining on the right limit of Nugget Creek and 4 Below in 1916. Although the Price Ditch intake is above the Old Company Ditch intake we got water any time we were short by telling *Price and they went up and closed the gate so we could fill our ditch.*" Tr. pp. 97 and 98. (Italics ours.)

Later on recross-examination this witness testified:

> "I am not positive if the Price Ditch wasn't finished until 1913". Tr. p. 99.

We submit that it clearly appears that plaintiff's predecessors appropriated all of the waters of Nugget

Creek by building the Old Company Ditch commenced in 1908, and the Price and Martin Ditch commenced in 1911, and it clearly appears from all the evidence that plaintiffs and their predecessors continued to take and appropriate to mining use all of the waters of Nugget Creek that could be carried in the Old Company Ditch until threatened interference by petitioner in 1938.

As to what that amount was there was evidence as follows:

Introduced in evidence without any objection was the judgment roll in the case of *Stinson* (respondent's predecessor) *v. James Murray*. From the complaint we find that the right to the waters of Nugget were at issue in that case. In that complaint the then plaintiff (Stinson) alleged that approximately 700 miners inches was the full, regular and natural flow of the waters of Nugget Creek.

In the case at bar Stinson (Tr. p. 83) testified:

> "Q. From the time you first went in there and the time you last saw it, what was the greatest amount of water taken out of Nugget Creek by the Old Company Ditch?
>
> A. Less than half of Nugget Creek.
>
> Q. In normal flow?
>
> A. Yes, sir.
>
> Q. How many miners inches would you estimate?
>
> A. Less than 300."

Dahl (at pp. 88 and 89) testified * * *

> "In 1932 two small pipeheads of water were being taken out by the Old Company Ditch. Not over 300 miners inches of water. This was about a third of the normal flow of Nugget Creek".

Harper testified (Tr. p. 71):

> * * * "When I was working in 1932, 1933 and 1934 I was using two nozzles, three inch nozzles under a 325 foot head. I was using 14 gauge pipe and I think there was 325 foot head on that".

We think this evidence amply sustains the court's judgment awarding to respondents 360 miners inches of water from Nugget Creek.

It will be borne in mind that respondents originally were entitled to waters flowing in the Price and Martin Ditch and the Old Company Ditch.

The authorities are uniform in holding that the "first appropriator has the right not only to change his point of diversion from the stream so far as he can do so without interfering with the rights of junior appropriators but he may also change the use to which he puts the water under the same limitation." *Farnum Water & Water Rights,* Vol. 3, p. 2097, Sec. 677, therefore respondents lost no right to the waters flowing in the Price and Martin ditch by enlarging the Old Company Ditch and putting the Price and Martin water through it.

The complaint in this action states plaintiff's necessity for the use of water in its mining operations and

in paragraph V that it *is using* the water of Nugget Creek therefor. Also (Par. VI) that it constructed the ditch known as the Price Ditch upon lands owned by plaintiff and that the defendant is threatening to divert the water of Nugget Creek into said ditch and is constructing a pipe line to said ditch and in so doing is trespassing upon the property of plaintiff (Italics ours). The right to water is a property right and the foregoing allegations with the appropriate allegations of irreparable damage contained in paragraphs VIII, IX and X state a cause of action for trespass which warrants injunctive relief.

PRESCRIPTION

Petitioner speaks (Br. p. 18) of "A right acquired by prescription." We do not exactly see the application of that reference in this matter. However, the record shows without dispute that respondents and their predecessors used water from the Old Company Ditch in mining in the years 1915-16-17-19-25-26-27-31-32-33-34-35-36-37 and 38; the use in the earlier years appearing in the testimony of Smith, Stinson, Harper and Balbanoff; the use from 1931 on appearing in the testimony of Harper, Morgan and Dahl, and perhaps others. None of their evidence as to time is disputed. There is no evidence as to use or non-use of Old Company Ditch during 1918-20-21-22-23-24-28-29 and 30.

CONCLUSION.

The matter involved in this suit is not a matter of great general interest. It involves a local dispute concerning the waters of a comparatively small creek in a mining district in Alaska. It is safe to say that the decisions do not involve any gross injustice since in the two trials over ten years apart involving this water the trial courts reached similar conclusions. The matters urged by petitioner as reasons for granting a writ of certiorari are matters involving the judgments of the trial and appellate courts upon mixed questions of law and fact which were strictly within their jurisdiction. In deciding those matters the Circuit Court of Appeals after a brief review of the evidence and pleadings announced its conclusion, that, (1) the complaint states a cause of action; (2) the evidence supports the findings and decree; (3) the laws of Alaska do not require posting or recording notice of appropriation of water; (4) the plaintiffs' water rights were not abandoned; and (5) the Territorial Statutes of 1917 with relation to water rights of riparian owners were not applicable in this case.

It has not gone beyond its jurisdiction and has not announced any rule of decision in conflict with any rule of decision of any other Circuit Court of Appeals; nor has it decided any question of local law in a way probably in conflict with applicable local decisions; nor its decision involving an important question of federal law; nor has it decided a federal ques-

tion in a way probably in conflict with applicable decisions of the United States Supreme Court; nor has it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of the United States Supreme Court.

Therefore the petition for writ of certiorari should be denied.

Respectfully submitted

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